

STATE OF MICHIGAN
SUPREME COURT

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JAMES O. GORE AND BOBBIE N. GORE,

Plaintiffs-Appellees,

v

FLAGSTAR BANK, FSB,

Defendant-Appellant

SUPREME COURT

#. 127669

COURT OF APPEALS

#: 248919

LOWER COURT

#: 01-034913 CK

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**APPELLANT, FLAGSTAR BANK, FSB'S, SUPPLEMENTAL BRIEF IN SUPPORT
OF ITS APPLICATION FOR LEAVE TO APPEAL**

PROOF OF SERVICE

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DEC 1 2005
CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

TABLE OF AUTHORITIES

Case Law

<i>Crown Technology v. D&N Bank, FSB</i> , 242 Mich App 538; 619 NW2d 66 (2000)	3
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INTRODUCTION

Defendant-Appellant, Flagstar Bank, has filed an Application for Leave to Appeal a decision of the Michigan Court of Appeals in this matter. The Appellees have filed a Brief in Opposition to the Appellant's Application for Leave to Appeal. Defendant-Appellant has filed a Reply Brief.

Pursuant to an Order of the Supreme Court dated November 3, 2005 granting oral argument on Appellant's Application for Leave to Appeal, Appellant submits this Supplemental Brief in order to update the case law submitted in its previous application materials. The Appellant relies upon its recitation of facts and proceedings and the legal arguments advanced in its Application for Leave to Appeal and Reply Brief, and in accordance with this Court's November 3, 2005 Order, refrains from submitting a restatement of arguments made in its application papers.

ARGUMENT

Defendant-Appellant has thoroughly reviewed the case law and other authorities submitted in support of its Application for Leave to Appeal, and asserts that there have been no adverse changes in the law relating to this case since its previous submissions. Appellant's position is that the case law and other authority remains good law relative to the positions advanced regarding promissory estoppel and the statute of frauds. The sole purpose of this Brief is to present to the Court another case that discussed the inter-relationship between the statute of frauds in Michigan and the theory of promissory estoppel.

The case is *Industrial Maxfreight Services, LLC v. Tenneco Automotive Operating Company*, 182 F.Supp.2d 630 (W.D. Mich. 2002), a Federal court case interpreting Michigan law. In that case, the court stated:

“...the Court is of the firm conviction that Michigan courts would apply extra caution where the doctrine of promissory estoppel is invoked to circumvent the statute of frauds in the real estate context.” *Id.* at 633

While the *Industrial Maxfreight* case is factually distinguishable from this case, the policy consideration is clear. The court went on to state:

“...Michigan courts apply the doctrine of promissory estoppel cautiously, and only where the facts are unquestionable and the wrong to be preserved undoubted. *Marrero*, 200 Mich App at 442-442, 505 N.W.2d 275. If the doctrine of promissory estoppel is to be applied to circumvent the statute of frauds, it should be applied only to avoid the perpetration of a fraud.” *Id.* at 636.

Here, Plaintiffs alleged that Mr. O'Connell promised them they would get their loan. However, Flagstar's employees denied these accusations. Thus, the facts are not unquestionable. Further, there was no credible evidence presented at trial that anyone working for the Bank was trying to perpetrate a fraud on the Plaintiffs.

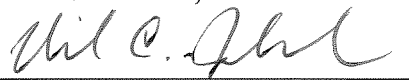
Lastly, as the *Industrial Maxfreight* court succinctly stated: “Non-enforcement of the statute of frauds under the circumstances of this case would render the statute of frauds meaningless.” *Id.* at 637. Likewise, in this case, and in accordance with *Crown Technology v. D&N Bank, FSB*, 242 Mich App 538; 619 NW2d 66 (2000), the statute of frauds bars Plaintiff’s claims.

It is also important to note that the *Industrial Maxfreight* case was decided on Summary Judgment. In other words, the trial judge felt no compunction to send the issue of promissory estoppel to a jury, and issued his ruling as a matter of law. Likewise, in this case, Judge Warren correctly ruled that the issue of promissory estoppel should not have been submitted to the jury, and made his ruling in favor of Flagstar as a matter of law.

Plaintiffs claims are simply not sustainable, under a theory of breach of contract, promissory estoppel, or otherwise. Judge Warren at the Circuit Court found that this was so in ruling on Flagstar’s Motion for Judgment Notwithstanding the Verdict, and Appellant seeks leave to appeal to convince this Court similarly.

Respectfully submitted,

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Dated: December 1, 2005.